FOR ARGUMENT

No. 92-515

In The
Supreme Court of the United States
October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari
To The Supreme Court Of Wisconsin

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THIS COURT IS NOT BOUND BY THE WISCONSIN SUPREME COURT'S CONCLUSION THAT THE PENALTY ENHANCER PUNISHES THOUGHT BECAUSE THAT CONCLUSION WAS NOT THE RESULT OF THE STATE COURT'S CONSTRUCTION OF THE STATUTE, BUT WAS WHOLLY THE RESULT OF ITS FIRST AMENDMENT ANALYSIS.

Respondent Mitchell contends that the Wisconsin Supreme Court issued a binding construction of a statute when it concluded that the penalty enhancer punishes "motive," a term the state court equated with

pure thought. However, there is a difference between determining the meaning of words and phrases in a statute (i.e. statutory construction) and assessing whether the statute has the effect of violating the First Amendment (i.e. constitutional analysis). Here, the Wisconsin Supreme Court simply looked at the statute, concluded that it had the effect of punishing thought and, therefore, found a First Amendment violation.

The Wisconsin court never hinted that there was an ambiguity in the statute that required clarification before the First Amendment issue could be addressed. And it did not address the meaning of specific words or phrases. Thus, the court did not "construe" the language of the enhancer.[1]

The state court made it clear it was addressing the effect of the law. For example, the court said that while the statute "refers in a literal sense to the intentional 'conduct' of selecting," it need not ignore the "***practical effect*** of the law--punishment of offensive motive or thought" (J.A. at 37, emphasis added). Furthermore, as the State pointed out in footnote 4 of its opening brief, the *Mitchell* majority did not dispute the construction given the statute by dissenting Justice Bablitch when he construed the law in the context of Mitchell's vagueness claim (J.A. at 37 n.11). The majority's only

[1]*See Rundlett v. Oliver*, 607 F.2d 495, 500 (5th Cir. 1979) (state court *construction* of statutes that federal courts defer to "refers to the structure of a statute, what its words mean, and how it operates"). When the Wisconsin Supreme Court construes a statute, it generally does so expressly and relies on rules of statutory construction. *See, e.g., State v. Richer*, Case No. 91-1466-CR (Wis. Sup. Ct. filed March 10, 1993); *State v. Moore*, 481 N.W.2d 633 (Wis. 1992); *State v. Annala*, 484 N.W.2d 138 (Wis. 1992).

disagreement with the dissent involved the effect of the law.

The State's response to the statutory construction argument at the petition stage bears repeating: "It would come as a great surprise to the Wisconsin high court to learn that it issued a narrow decision based on a particular view of [the Wisconsin statute]. Rather, the Wisconsin court intended to strike a fatal blow at the entire concept of penalty enhancement based on proof that the criminal selected his or her victim by reason of the victim's race or other status" (petitioner's reply to brief in opposition to petition at 2).

II. THE WISCONSIN PENALTY ENHANCER IS NOT A "THOUGHT CRIME" BECAUSE CONSIDERING A DEFENDANT'S MOTIVES FOR CRIMINAL CONDUCT IS NOT THE SAME AS PUNISHING A DEFENDANT FOR HOLDING DISFAVORED BELIEFS.

Mitchell argues that even if this Court is not bound by the state court, this Court should itself conclude the enhancer is void on its face because it punishes thought in violation of the First Amendment. He presents two central arguments: 1) that the enhancer punishes thought because it authorizes the punishment of people because they have disfavored "motives" and "[m]otive consists entirely of . . . thoughts and beliefs," and 2) that even if the enhancer does not directly punish thought, it is still impermissible because it singles out people with certain disfavored motives (respondent's brief at 7). Both of these arguments rely on incorrect assumptions about motivation for action.

A. The consideration of motive for criminal action for purposes of assessing crime severity does not amount to punishing offenders because they hold certain beliefs.

Mitchell claims that the enhancer punishes people for their thoughts because it has the sole effect of punishing "motive," a pure thought process. He asserts we know that a thought process is singled out and separately punished because the proper disposition for the criminal *conduct* is entirely dealt with by the underlying criminal law applicable in each case. This argument is also one Mitchell claims distinguishes the enhancer from other anti-discrimination laws (respondent's brief at 37). The problem with this reasoning is evident.

First, there is an obvious difference between: 1) punishing a person because he holds disfavored beliefs, and 2) considering a motive for an executed crime for the purpose of assessing crime severity and relevant characteristics of the offender. Criminal laws and criminal sentencing routinely employ the latter process and there is nothing about the enhancer that suggests it is any different.

Second, in criminal law, as in anti-discrimination law generally, motives do matter. Among many unfair non-job related reasons for firing an employee, we deem discriminatory reasons based on religion or race, for example, to be a greater societal evil. Among the myriad of reasons people commit murder, many states single out pecuniary motives as warranting the death penalty.[2] And if a racist motive for a crime sheds light

[2]Mitchell is wrong when he asserts that capital sentencing schemes like the one in *Jurek v. Texas*, 428 U.S. 262 (1976), do "not turn on motive, but on the objective act of formation of a contract to murder" (respondent's brief at 12-13). The Texas capital sentencing law is not limited to murders involving the formation of a contract to murder. *Beets v. State*, 767 S.W.2d 711, 737 (Tex. Cr. App. 1987), *cert. denied*, 492 U.S. 912, *reh. denied*, 492 U.S. 937 (1989). Furthermore, many state capital sentencing statutes single out financial motives without reference to murder contracts. *See State v. McDonald*, 661 S.W.2d 497 (Mo. banc. 1983) (listing several capital murder statutes). Also, it is notable that courts often speak in terms of "motive" in these cases. *E.g.*, *State v. Carriger*, 692 P.2d 991, 1010 (Ariz. 1984) ("to prove pecuniary gain, the state must show [the murderer's] *motivation* was the expectation of pecuniary gain").

on proper dispositional factors, that motive can supply the reason for a more severe punishment. *See Barclay v. Florida*, 463 U.S. 939, 948-49 (1983).

Simply repeating over and over that motive is punished for its own sake does not make it true. Although people are sometimes said to have motives apart from their actions, the enhancer only deals with motives for executed crimes. When a person acts on a belief, the government's interest is not in regulating the belief, but in regulating the conduct and assessing the nature of the conduct and the culpability of the offender in light of the offender's motives. Motives are not shielded from examination just because they can be characterized as a thought process.

B. This Court should not extend the free speech principles of content and viewpoint neutrality to motives for executed crimes.

Mitchell asserts that this Court's content and viewpoint analysis in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), "logically applies to conduct, even criminal conduct" (respondent's brief at 8). If this Court

agrees with the State that thoughts and viewpoints are not punished, Mitchell's argument boils down to a disparate impact theory: the enhancer is *effectively* content and viewpoint based because, even when applied as the State suggests, it only falls on offenders with "disfavored" motives and views and not on offenders who act on "favored" motives or hold the "favored" views.[3]

The novel proposal that First Amendment free speech doctrine relating to content and viewpoint neutrality should be applied to motives for criminal actions must be rejected. Mitchell has pointed to no case in which these terms were applied to laws that did not regulate expression, either directly or indirectly.

Mitchell believes that *R.A.V.* applies here because, he asserts, it extended content-based and viewpoint-based analysis to "punishable acts" (respondent's brief at 7). He says that whether those punishable acts are "speech or nonspeech is irrelevant" (*id.*). However, the significance of *R.A.V.* in this respect was that it applied content-based and viewpoint-based concepts to

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[3]Any suggestion that the enhancer favors one ideology over another on its face should be quickly rejected. Under Mitchell's theory, the "disfavored" views are intolerance and hatred based on the various statuses listed in the enhancer, while the "favored" views apparently embrace tolerance and intergroup harmony. But the enhancer can readily be applied to offenders who have the "favored" views on these topics. For example, the enhancer applies to a radical tolerance group that singles out a black victim for a crime to raise the visibility of its cause. It also applies to criminals who act with a purely financial motive, such as a landowner who targets minorities for vandalism in order to drive them out of his neighborhood and preserve the value of his real estate holdings. Like anti-discrimination laws generally, liability under the enhancer does not depend on a particular view, but on the act of singling out a victim because of his status.

invalidate a regulation on a category of *speech* many had believed was entirely unprotected. *See R.A.V.*, 112 S. Ct. at 2551-54 (White, J., concurring). This Court did not reach outside the realm of speech to bring "punishable acts" into First Amendment doctrine. Rather, it recognized that "unprotected" speech was speech nonetheless for limited First Amendment purposes.

Mitchell reassures this Court that the consideration of many motives poses no constitutional problems. He says many motives, such as pecuniary motives, are content and viewpoint neutral because they do "not implicate the defendant's opinions or beliefs" (respondent's brief at 13). But this proposition is faulty at its core because it ignores the tests for content and viewpoint neutrality. Regulations on speech are content-based when they regulate categories of speech or topics. If a law cannot be justified without reference to the content of the speech, it is content-based. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Laws are viewpoint-based when they go beyond singling out categories or topics and actually specify particular viewpoints. *E.g., Schacht v. United States*, 398 U.S. 58, 63 (1970). Under these tests, the consideration of all criminal motives involves an assessment of content and viewpoint.

For example, we can only determine whether there is a pecuniary motive by looking to the "content" of the motive. Consideration of the motive is inextricable from the type of motive involved. And the consideration of pecuniary motives is not viewpoint neutral. In theft crimes, a desire to feed one's family is treated differently than a desire to buy illegal drugs. Moreover, pecuniary motives are not apolitical. In a society based on private ownership, views on greed and who is entitled to property are inherently political.

The logical extension of Mitchell's argument is that the *Dawson* and *Barclay* decisions are invalid to the extent they approve the consideration of racial hate motives. If, according to Mitchell, the First Amendment is violated when racial hate motives are considered because such motives undoubtedly reflect "a viewpoint on a political and social issue" (respondent's brief at 13), then the sentencing judge in *Barclay* should not have considered Barclay's racial motive. The penalty enhancer context does not provide a relevant distinction. If an offender receives a longer sentence solely because of his motive, the same First Amendment issue arises whether that increase occurs in the context of underlying penalty parameters or in an enhanced penalty range.

Furthermore, Mitchell could not reasonably argue that laws against conduct infringe on protected thought whenever they reflect a moral judgment about a societal issue. "'The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2462 (1991), quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was a rational basis for sodomy law).

The application of content-based and viewpoint-based restrictions developed in a free speech context to statutes proscribing criminal conduct would interfere with state legislative authority to make moral judgments about the severity of conduct. Although states "must remain neutral in the marketplace of ideas," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978), they must not remain neutral in assessing the morality of criminal conduct. Wisconsin has the

authority and a moral obligation to confront discriminatory conduct. While the State cannot and should not combat discrimination or promote racial harmony by prohibiting disfavored speech or punishing people for holding disfavored beliefs, it can certainly fight discrimination, as it has done here and in other anti-discrimination laws, by giving special consideration to discriminatory motives that prompt particularly harmful conduct.

Mitchell's suggestion that this Court apply content-based and viewpoint-based First Amendment doctrine to conduct or to motives for conduct is an invitation to examine countless moral and practical judgments on the content of criminal motives, both by legislatures and by trial courts that impose differing sentences because of differing motives. And these judgments about the content of motives are not limited to the criminal arena. Accordingly, this Court should be reluctant to "'embark the judiciary on a long and difficult journey to . . . an uncertain destination.'" *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1990), quoting *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

III. NEITHER *DAWSON* NOR *BARCLAY* IS DISTINGUISHABLE ON THE BASIS THAT IT INVOLVED AN INDIVIDUALIZED DISPOSITION IN THE ABSENCE OF A PENALTY ENHANCER.

Mitchell contends that the State's reliance on *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), and *Barclay v. Florida*, 463 U.S. 939 (1983), is misplaced (respondent's brief at 16). He initially asserts that those cases only support consideration of a racial hate motive when it is relevant to what he labels a "content-neutral" factor such as "lack of remorse, the effects on victims, risk of

death to many people, or that the offense was committed 'in a particularly cruel and heinous manner'" (respondent's brief at 16). There may be no disagreement here, depending on what Mitchell means by "content-neutral." The State does tie the enhancer to such "content-neutral" factors: nature of the crime, deterrence, dangerousness of offender and the effects on the victim and the targeted group.

Mitchell's main argument appears to be this. It is permissible, in the absence of a discrimination crime penalty enhancer, for a judge to increase a sentence because of the presence of a racial hatred motive because in that situation judges look to individualized facts to see whether harms are actually present. In contrast, the penalty enhancer is an improper "per se surrogate" for such individualized consideration (respondent's brief at 16; see also 25, 29, 30). But this argument misses the mark for at least two reasons.

First, the Wisconsin law is an individualized sentencing law. It does not specify the penalty to be imposed. A sentencing judge is completely free to impose a sentence below the maximum for the underlying offense or even to impose no prison or fine at all. The law leaves judges free to tailor sentences to the facts of each case.[4]

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[4]The enhancer does have one mandatory aspect that did not apply in the instant case. It directs that a single class of misdemeanors, Class A misdemeanors, become felonies if the enhancer is proven. Wis. Stat. § 939.645(2)(b). Of course, if this mandatory aspect were held unconstitutional, it could be severed from the remainder of the statute which is at issue here. But Wisconsin does not rest its constitutional argument on the non-mandatory nature of its penalty enhancer. Although the Wisconsin legislature thought it wise to leave discretion with the sentencing judge, it could have determined that there are evils

Second, criminals have no federal constitutional right to individualized sentencing in a non-capital case. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701-02 (1991); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Thus, for example, a sex offender could not complain about a mandatory sentence based on his assertion that his victim was an infant oblivious to the assault and, therefore, that the victim harms contemplated by the legislature were not present.

Recently, in *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), this Court upheld a mandatory enhancement for a defendant's perjury in the context of the Federal Sentencing Guidelines. This Court did not concern itself with whether there was a justification for the increase in every case. Rather, it upheld the law, stating:

> A sentence enhancement based on perjury does deter false testimony in much the same way as a separate prosecution for perjury. But the enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. . . . It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. . . .
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inherent in discrimination crimes and created mandatory minimum penalties.

> . . . And that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds, in these circumstances, for its invalidation.

Id. at 1118.

IV. THE RESPONDENT'S PROFFERED DISTINCTIONS BETWEEN THE WISCONSIN ENHANCER AND OTHER ANTI-DISCRIMINATION LAWS IGNORE THE DIFFERING POWERS AND INTERESTS OF STATE AND FEDERAL GOVERNMENT.

Mitchell suggests that this Court should feel free to strike down the enhancer without fear that other anti-discrimination laws are at risk. He says that even if those other anti-discrimination laws "turn on motive in the same way as" the enhancer, they are nonetheless constitutional because "they are narrowly drawn to infringe upon First Amendment rights only insofar as necessary to serve the governmental interests for which they were enacted" (respondent's brief at 38). But his attempts at explaining why the enhancer is different than civil rights laws or other anti-discrimination laws in any relevant respect lack substance.

He seems to say that the federal anti-discrimination laws he cites serve a more compelling state interest because they are designed to protect constitutional and statutory rights. This argument simply ignores the state's compelling interest in protecting its citizens from a particularly harmful type of crime: crime committed because of the status of the victim. *See R.A.V.*, 112 S. Ct. at 2549-50 (safeguarding the right of group members to "live in peace where they wish" is a compelling state interest); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (state has a compelling interest in eradicating discrimination against its citizens). The State's interest in the enhancer is not less legitimate or less compelling than the interests served by the federal anti-discrimination laws that Mitchell identifies.[5]

Mitchell's suggestion that elimination of the enhancer would not deprive the state of the ability to deal with the criminal conduct (respondent's brief at 39), is based on the erroneous assumption that the state legislature may not make the judgment that discrimination crime is a distinct crime and distinct societal problem warranting increased attention and resources.

Mitchell also makes a puzzling argument regarding a distinction between governmental intervention in "public sphere" discrimination and "private" discrimination (respondent's brief at 39-41). He first contrasts the "public sphere" area that the federal anti-discrimination laws cover with the area covered by the enhancer. He seems to believe that the discrimination aspect of a crime addressed by the enhancer is a "private" act and that states have no power to deal with private acts of discrimination.

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[5]Mitchell argues that if the "harmful effects of 'a distinctive idea'" can suffice as a compelling state interest justifying the penalty enhancer, then there is no reason states could not use the same reasoning to prohibit marches, books and speech on particular topics (respondent's brief at 22). However, the State has not asserted that the harmful effects of speech, no matter how demonstrable, serve as justification for the suppression of speech. Even unprotected speech cannot be regulated based on content. *R.A.V.*, 112 S. Ct. 2538. At the same time, the constitution does not require a blind eye toward the harmful effects of discriminatory *conduct*, even if part of that harmful effect is emotional harm. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986).

Mitchell's analysis ignores fundamental differences between state and federal authority. The federal government is one of enumerated, delegated powers only. It has no plenary power to provide for the general welfare, but has only those powers that are expressly conferred upon it and reasonably to be implied therefrom. The states and their legislatures, in contrast, have all governmental powers except those specifically reserved or denied. *See United States v. Butler*, 296 U.S. 1, 64-65 (1936); *Hall v. Wisconsin*, 103 U.S. 5, 11 (1880); *Patterson v. Kentucky*, 97 U.S. 501, 503-04 (1879). The states have plenary police power to legislate to protect the lives, health and property of their citizens, to prohibit things reasonably thought to bring evil or harm to their people and to protect the well-being of the community. *See Patterson v. Kentucky*, 97 U.S. at 503; *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949); *Whalen v. Roe*, 429 U.S. 589, 597 (1977).[6]

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[6]Mitchell attacks the justifications for the exercise of state plenary authority offered by the State. One of his arguments merits a response here. He disputes the assertion that discrimination crimes are increasing in number, thus warranting penalties with a greater deterrent effect. But his reliance on the most recent Anti-Defamation League report for the proposition that such crime is not increasing is misplaced. While there has been a one year dip in anti-Semitic incidents for 1992, the small drop follows five yearly increases, from 1986 to 1991. *See* Brief of *Amici Curiae* the Anti-Defamation League, et al., at 5-6; *cf. Gregg v. Georgia*, 428 U.S. 153, 186 n.34 (1976) (this Court pointed to an increasing trend in the number of murders, despite a decline in the most recent year). Mitchell's reliance on FBI and Wisconsin Sentencing Commission data is equally misplaced. The FBI data collection system is in its infancy with just a fraction of police agencies participating. *See* Stephen Labaton, *Poor Cooperation Deflates F.B.I. Report on Hate Crime*, New York Times, January 6, 1993, at A8. The Wisconsin Sentencing Commission data on felony convictions do not deal with trends, do not reflect all felony charges and do not reflect misdemeanors. On the other hand, there are several indicators that discrimination crime is on the rise. *See* Brief of *Amici Curiae* of the California Association of Human Rights Organizations, et al., at A-1; Brief for Lawyers' Committee for Civil Rights of the San Francisco Bay Area, at 17-19; *see also* Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. Law & Policy Rev., at 174-75 (Winter 1992-93); Klanwatch Intelligence Report, February 1993; Associated Press *Study Says Gay Bashing Is Up*, New York Times, March 13, 1993, at 9.

The "club" cases Mitchell relies on, such as *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), pit the plenary authority of states to prevent discrimination against First Amendment associational rights of citizens. Thus, the question in those cases was not whether states have general authority to prohibit private discrimination. The question was whether specific state actions violated First Amendment rights. Todd Mitchell could not credibly claim that he has an associational right to criminally victimize whomever he chooses.

Therefore, whatever the limits on federal power to prohibit private acts of discrimination, Mitchell has not shown that states are generally prevented from enacting such laws. The proper question remains: does the Wisconsin enhancer violate the constitution because it effectively regulates a protected First Amendment activity. The answer, as shown above and in the State's opening brief, is no.[7]

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[7]Although the enhancer should not be subjected to strict scrutiny analysis, it would pass such scrutiny. The law is permissible because it serves a compelling state interest and is "necessary" to serve that interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1851-52 (1992); *R.A.V.*, 112 S. Ct. at 2549-50. There is no doubt that a state has a compelling interest in eradicating discrimination against its citizens. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The purpose of the Wisconsin penalty enhancer is to deter acts of violence and other crimes directed at citizens because of their status, that is, to deter

V. THE WISCONSIN ENHANCER IS CONSTITUTIONAL AS APPLIED TO "SPEECH-CRIMES"; BUT EVEN IF SUCH APPLICATIONS WERE QUESTIONABLE, FACIAL INVALIDATION IS NOT REQUIRED.

Mitchell contends that the enhancer is facially invalid because it can be applied to crimes committed by the use of words, such as defamation and disorderly conduct (respondent's brief at 31-32). However, if the penalty enhancer is properly applied to "speech-crimes," there is no First Amendment problem. "Speech-crimes" are still criminal acts. If a "speech-crime" victim is selected because of the victim's status, an act of discrimination occurs just as surely as it does under Title VII when the act of discrimination consists entirely of words. The enhancer no more authorizes the punishment of the content of the speech than does Title VII. The content of speech is only relevant insofar as it evidences intentional selection and informs on legitimate dispositional factors, such as the nature of the conduct,

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discrimination which takes criminal form. The law is necessary because enhanced penalties create greater deterrence, lead to increased public protection by allowing longer quarantine periods for offenders, and allow for the imposition of punishment that the legislature has deemed appropriate for this more serious crime.

The State notes that Mitchell is mistaken when he asserts that Wisconsin analogized the enhancer to the draft card destruction law in *United States v. O'Brien*, 391 U.S. 367 (1968) (respondent's brief at 14). The only reference the State made to *O'Brien* was in a footnote refuting the suggestion that discrimination crimes can be considered expressive conduct (brief of petitioner at 13 n.1). And once again, the point was not that the enhancer could not survive the level of scrutiny applied in *O'Brien*, but that it should not be subjected to scrutiny reserved for regulations on expression.

the harm caused and the offender's criminal dangerousness.

Furthermore, Mitchell's argument runs directly counter to this Court's language in *R.A.V.*. If the Wisconsin enhancer *only* applied to the state disorderly conduct statute, a law that includes a general prohibition on fighting words, Wisconsin would have precisely the same law described with apparent approval in *R.A.V.*, a "prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); . . ." *Id.* at 2548 (emphasis in original).

Finally, even if the application of the enhancer to crimes not before the Court were problematic, the result is not facial invalidation. A statute is not facially invalid simply because it is capable of unconstitutional applications. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989) (Texas flag burning statute not struck down on its face because it was capable of constitutional applications); *see also Street v. New York*, 394 U.S. 576, 580-81 (1969); *cf. Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (facial invalidation may be appropriate when statute has vagueness flaws, even though legitimate applications are possible).

VI. THE WISCONSIN STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE AND IT IS NOT UNCONSTITUTIONALLY VAGUE.

Mitchell's equal protection and vagueness claims should be summarily rejected by this court.[8] His equal protection claim has no life apart from the First Amendment question this Court accepted for review. His only argument is that the enhancer should undergo strict scrutiny because it treats people differently based on protected First Amendment rights (respondent's brief at 43–44). Resolution of the direct First Amendment claim disposes of this issue also.

Mitchell's vagueness claim lacks merit on its face. He contends the phrase "because of" is unconstitutionally vague because it does not specify precisely what role the victim's status must play in victim selection: the sole reason, a predominant reason, a contributing reason, a minor reason or an unconscious reason (respondent's brief at 47). He asserts this statutory ambiguity is

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[8]The state appellate court declined to consider Mitchell's equal protection claim because he did not raise it in the trial court, as required under Wisconsin law to preserve the issue for appeal (J.A. at 17). The state supreme court simply indicated in a footnote that it would not consider either the vagueness or equal protection claims because it found the statute facially unconstitutional on First Amendment grounds (J.A. at 28). In any event, the equal protection arguments Mitchell raises in this Court are not the arguments he made in the state appellate courts (see state supreme court brief of defendant-appellant-petitioner at 21–24; court of appeals brief at 13–15). Under state law, Mitchell's failure to challenge the statute as unconstitutionally vague in the trial court did not preclude appellate court review (J.A. at 17). However, in this Court, Mitchell expands considerably the vagueness claim he argued in the state courts.

heightened by a recent amendment to the statute. But his argument misconstrues the nature of a vagueness claim. Statutory ambiguity is not the equivalent of vagueness.

Just because a statute is ambiguous does not make it unconstitutionally vague. *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990). New statutes frequently contain ambiguities. *Id.* If that made them vague, it would be difficult to enact valid laws. *Id.* "A statute that contains one or several ambiguities that can be dispelled at a stroke by interpretation . . . is not vague in the constitutional sense. . . . [O]nce the [state court] resolve[s] [the statutory interpretation question] the ambiguity" is dispelled. *Id.*

Mitchell cannot base a vagueness challenge on the ground that the enhancer might even apply where the status of the victim was an insignificant or unconscious factor. *See Smith v. Goguen*, 415 U.S. 566, 577–78 (1974); *Parker v. Levy*, 417 U.S. 733, 760 (1974). And the enhancer unquestionably gave Mitchell notice that his conduct put him in jeopardy. Whatever the precise meaning of the language, it unquestionably applied to Mitchell's conduct in this case, where he directed a criminal attack on his victim, saying to his accomplices, "'Do you all feel hyped up to move on some white people?'" and "'There goes a white boy; go get him'" (J.A. at 28–29).

The State is not aware of any case in which a court has found an anti-discrimination statute unconstitutionally vague because it employs the phrase "because of" and there is no reason to do so here.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be vacated and the case remanded.

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18 U.S.C. § 245. Federally protected activities

(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been--

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer"

means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

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42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1985. Conspiracy to interfere with civil rights

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603 (b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

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42 U.S.C. § 3613. Enforcement by private persons

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

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42 U.S.C. § 3614. Enforcement by the Attorney General

(d) Relief which may be granted in civil actions under subsections (a) and (b)

(1) In a civil action under subsection (a) or (b) of this section, the court--

(C) may, to vindicate the public interest, assess a civil penalty against the respondent.

SUBCHAPTER II--PREVENTION OF INTIMIDATION

42 U.S.C. § 3631. Violations; bodily injury; death; penalties

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--

(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from--

(1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate--

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wis. Stat. 101.22 (6) (h) 3.

3. In addition to any damages ordered under subd. 1, the administrative law judge may assess a forfeiture against a respondent who is a natural person in an amount not exceeding $10,000, unless the respondent who is a natural person has been adjudged to have committed any prior discriminatory act under sub. (2), (2m) or (2r). If a respondent who is a natural person has been adjudged to have committed one other prior discriminatory act under sub. (2), (2m) or (2r) based on an offense date that is before

September 1, 1992, the administrative law judge may assess a forfeiture in an amount not exceeding $25,000. If a respondent who is a natural person has been adjudged to have committed 2 or more prior discriminatory acts under sub. (2), (2m) or (2r) based on an offense date that is before September 1, 1992, the administrative law judge may assess a forfeiture in an amount not exceeding $50,000.

Wis. Stat. 101.22 (6m) (a)

(6m) CIVIL ACTIONS. (a) Any person, including the state, alleging a violation of sub. (2), (2m) or (2r) may bring a civil action for injunctive relief, for damages, including punitive damages, and, in the case of a prevailing plaintiff, for court costs and reasonable attorney fees.

Wis. Stat. 101.22 (10) (d)

(d) *Penalty.* 1. A person who wilfully violates sub. (9) or any lawful order issued under this subsection shall, for the first violation, forfeit not less than $100 nor more than $1,000.

Wis. Stat. 111.321 Prohibited bases of discrimination. Subject to ss. 111.33 to 111.36, no employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or

this state or use or nonuse of lawful products off the employer's premises during nonworking hours.

Wis. Stat. 111.322 Discriminatory actions prohibited. Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

(2m) To discharge or otherwise discriminate against any individual because of any of the following:

(a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(c) The individual files a complaint or attempts to enforce a right under s. 66.293 or 103.49 or testifies or assists in any action or proceeding under s. 66.293 or 103.49.

(d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Wis. Stat. 904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Wis. Stat. 904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wis. Stat. 940.20(2)

(2) BATTERY TO LAW ENFORCEMENT OFFICERS AND FIRE FIGHTERS. Whoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class D felony.